No. 11,152

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY (a corporation),
Appellant,

vs.

A. QUANDT & SONS (a co-partnership),
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

Upon the solicitation of the agent of the appellant, Mr. J. H. Wood (Tr. p. 48), Mr. Theodore W. Quandt signed the application for insurance with the appellant company on the 15th day of November, 1943. The medical examination by Dr. George W. Cox, appellant's physician, was apparently signed on the 13th day of November, 1943. The policy of life insurance was delivered to A. Quandt & Sons, a co-partnership of which the deceased Theodore W. Quandt, was a member, on the 4th day of December, 1943. Mr. Quandt, the insured, died on April 2, 1944. At the time the policy of insurance was delivered, the

premium required to be paid was paid to the agent of the appellant.

It is our contention that the life insurance policy went into effect at the time of its delivery on the 4th day of December, 1943.

At the time of the trial of the action in the District Court, there were a great number of objections raised as to the validity of the policy of insurance but all of these have been abandoned by appellant (Appellant's Brief, p. 3), so that there is but one question now presented to the Court for consideration upon this appeal.

One of the paragraphs of the application for life insurance, which is attached to and made a part of the policy of insurance (Tr. p. 22) reads as follows:

> "It is agreed as follows: 1. That the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the Proposed Insured is in sound health."

ARGUMENT.

I.

THE WORDS "SOUND HEALTH" AND THE WORDS "GOOD HEALTH" AS USED IN AN INSURANCE POLICY HAVE BEEN DEFINED BY A NUMBER OF DECISIONS, BOTH IN STATE COURTS AND IN THE UNITED STATES CIRCUIT COURTS.

In the case of *Burr v. Policy Holders Life Insurance Association,* 128 Cal. App. 563, 566, the Court defined the term "good health" as follows:

"The term 'good health' in a life insurance policy or application is comparative, and an assured is in good health unless affected with a substantial attack of illness threatening his life. It does not mean perfect health; nor would it depend upon ailments slight and not serious in their natural consequences."

Maine Benefit Assn. v. Parks, 81 Me. 79, 10 Am. St. Rep. 240;

Wills v. Policy Holders Life Insurance Association, 12 Cal. App. (2d) 659, 666;

Turner v. Redwood Mutual Life Assurance Company, 13 Cal. App. (2d) 573, 580.

In *Cooley's Brief on Insurance,* page 3296, it is said with respect to the use of the term "good health":

"If the applicant is free from apparent sensible disease and unconscious of any derangement of important organic functions, he may truthfully say he is in good health."

In *Northwestern Mutual Life Insurance Company v. Wiggins,* decided November 1, 1926 by this Court, 15 Fed. (2d) 646, 648, the Court said:

"Good health, illness and disease must be considered in an application for insurance, not in the light of scientific, technical definitions but in the light of the insured's understanding in connection with which the terms are employed in the examination."

II.

THE APPELLEE AND INSURED HAD NO KNOWLEDGE OF ANY KIND THAT AT THE TIME THE INSURANCE POLICY WAS WRITTEN AND DELIVERED THAT HE HAD ANY AFFLICTION OF ANY KIND OR CHARACTER AND UNKNOWN PHYSICAL CONDITIONS DO NOT NULLIFY THE POLICY OF INSURANCE.

There is no evidence of any kind in the record that discloses that the insured, Theodore W. Quandt, had any knowledge of any kind or character that at any time he was afflicted with a cancer. It is now admitted by the appellant (Appellant's Brief, p. 3) that the assured had no knowledge at the time of delivery of the policy that he was suffering from a cancer or any other ailment.

It is our contention that if the deceased did not know of any ailment that he could not and did not make any false representation that would nullify the policy of insurance. The appellant in his brief (p. 3) has stated, "Nor, on this appeal is any reliance had upon any concealment or misrepresentations made in the application for the insurance by the assured." However, appellant does claim that because of the provision in the life insurance policy that the insured must be in "sound health" when the policy is delivered, and as the insured in this case is claimed not to have been in "sound health", that the policy never took effect.

It must be conceded that if Mr. Quandt, the insured, had any knowledge that he was suffering from cancer at the time the policy was delivered that it would be

concealment and indirect misrepresentations on his part of a sufficient character to nullify the policy.

A very similar case involving almost the same facts is the case of *Wills v. Policy Holders Life Insurance Association,* 12 Cal. App. (2d) 659, 663. In this case the questions asked in the application were as follows:

> "Q. Are you now in good health?
>
> A. Yes.
>
> Q. Have you any knowledge that any physical or mental disease exists in your system?
>
> A. No, I am in good health, and so far as I know have no disease or other conditions which would prevent me from obtaining life insurance."

At the trial of this case the Court found that it was not true that "she was now in good health" and decided the case against her and in favor of the insurance company. Upon appeal the decision was reversed, and in doing so the Court used the following language:

> "In spite of the fact that the autopsy disclosed a chronic heart disease which must have been developing for some time, there is not a syllable of evidence to indicate that the insured possessed knowledge of that fact. Nor is there any evidence that symptoms of the disease existed which should have warned a reasonable person of its presence. Nor are there any facts from which we may presume that the deceased knew of the existence of that disease. In truth, the affirmative evidence is just the contrary. She carried other insurance. She consulted no physician. She had worked constantly several years past. She appeared well, and she never complained of illness or ailment, even to

her friend and the beneficiary named by her in the policy. We are persuaded the insured did not know of the existence of any serious physical ailment when she applied for the policy. Certainly the defendant failed to prove that she had any such knowledge. The judgment is therefore not supported by the evidence."

In *Clark v. New Amsterdam Casualty Company,* 180 Cal. 76, 80, in considering an accident policy of insurance, the Court used the following language:

> "It has been held that the existence of unknown conditions tending to shorten the life of the assured does not nullify the policy." (Citing *Stanyan v. Security Life Insurance Company,* 91 Va. 83, and *Freeman v. Mercantile Mutual Assurance Company,* 156 Mass. 351.)

In the case of *Wills v. Policy Holders Life Assurance Co.,* 12 Cal. App. (2d) 659, 665, the Court said:

> "The burden was on the defendant to prove not only that the insured was afflicted with serious heart disease at the time she signed her application for membership but also that she knew that she had that ailment. Weiss v. Policy Holders Life Assurance Co., 132 Cal. App. 532, 536, 23 Pac. (2d) 38. The defendant failed to sustain this burden."

As the appellant in the case at bar did not show or prove that Mr. Quandt had any knowledge that he was suffering from cancer, of necessity he has failed in his proof, but to make the matter still stronger, the appellant has admitted that Mr. Quandt had no knowledge of any kind or character.

It being conceded by everyone connected with this case that the insured, Theodore W. Quandt, had no knowledge that he was afflicted with a cancer, it is hard to understand how he can be charged with concealment, misrepresentations or of any wrongdoing in accepting the policy of insurance, and it is equally hard to understand why the policy of insurance did not take effect immediately upon its delivery.

III.

THERE IS A CONFLICT OF TESTIMONY WITH REFERENCE TO THE INSURED'S SOUND HEALTH, AND AS THE TRIAL COURT FOUND IN FAVOR OF THE PLAINTIFF AND APPELLEE, THIS COURT WILL NOT DISTURB THE FINDING.

Appellant in his brief has stated that the insured was afflicted with a cancer of the colon and that the testimony with reference to that is uncontradicted. Appellant is in error in this respect because there is other testimony produced on behalf of the plaintiff and appellee, and as there is a conflict of testimony upon this subject, we understand the rule to be that the Circuit Court of Appeals will not disturb or reverse the judgment.

Mr. J. H. Wood, the agent and representative of appellant, was called on behalf of plaintiff, and among other things, testified as follows (Tr. pp. 47 and 48):

"Q. Did you know Mr. Quandt very well during his lifetime?

A. Quite well from the point of view of insurance and some of his personal affairs.

Q. You saw him very often?

A. Reasonably so, yes.

Q. At any of the times you have seen him and talked to him did he complain of any illness?

A. No.

Q. At the time you delivered the policy, as far as appearances were concerned, was he in sound health?

A. Perfectly so, yes."

Dr. George W. Cox, the examining physician for the appellant herein, was called on behalf of plaintiff, and among other things, testified as follows (Tr. p. 50):

"Q. At the time you made your examination of Mr. Quandt, did you make a thorough examination of him?

A. I think I did. I always do."

(Tr. p. 51):

"Q. What examination, if any, did you or could you make of the digestive organs?

A. Well, you bare the abdomen and see if there is evidence of anything unusual in the abdominal cavity.

Q. What did you find?

A. I did not find anything abnormal in it.

Q. As a matter of fact from your examination did you find the applicant at the time of your examination in sound health?

A. I recommended him for insurance.

Q. You found no ailment of any kind as far as the applicant was concerned?

A. Well, I found nothing that would be of consequence to the insurance company at least.

Q. Did you find anything?

A. I do not remember anything that was wrong."

(Tr. p. 52):

"Q. What would be the usual examination that might be made to discover whether a patient was suffering from cancer.

A. Well, one of the first things we would have would be an X-ray or make a microscopic examination but you do not go through that unless you have symptoms.

Q. You found at the time of making this examination no symptoms that warranted you in making any further examination to find out about any cancer? Is that correct?

A. That is correct."

Dr. V. A. Mitchell was called on behalf of plaintiff and testified in part as follows (Tr. p. 58):

"Q. You made a thorough examination of him at that time?

A. I gave him a complete physical examination at that time."

(Tr. p. 61):

"Q. What would you say, doctor, with reference to his general health on November 18, 1943 at the time you made your last examination?

A. Well, as far as I was aware at that time Mr. Quandt was in perfect health.

Q. When you say perfect, you mean, you are using the word of the policy, sound health?

A. Yes.

Q. At the various times you made your examination of Mr. Quandt was there anything, or any indication to you as a medical man that he was afflicted with cancer?

A. No, he never complained of any abdominal pains. He made no complaint of his stool. He

made no complaint as to vomiting and never made any complaint about any obstruction."

(Tr. p. 62):

"Q. Now doctor, is it possible for a patient to be afflicted with cancer such as Mr. Quandt had and he not know it?

A. Yes.

Q. And of course you found no indication at any time in your examination or your visit with him that he was afflicted with cancer?

A. No."

The testimony on behalf of appellant in this case with reference to the cancer was obtained from the autopsy surgeon who testified that the cause of death was cancer which was of some six months duration. The testimony we have quoted from shows conclusively a very serious conflict of the testimony with reference to the question of the insured's "sound health", and under those conditions, this Court will not interfere with the decision rendered in the District Court.

It is quite apparent that the trial judge believed the testimony on behalf of the plaintiff as heretofore quoted and if he believed the testimony, it is not within the province of the Appellate Court to reverse the decision. It is only when there is no testimony upon the subject or no testimony of probative value that the Court will reverse the decision.

In the case of *Mutual Life Insurance Company,* appellant, *v. Frey,* appellee, decided by this Court,

and reported in 71 Fed. (2d), 259, 261, Walter E. Frey made application for insurance on March 4, 1932. He was examined by the company's doctor, Dr. Allen, on March 5, 1932 and found in "good health" and Dr. Allen so reported it to the appellant. The insured died May 4, 1932. Dr. Berger performed an autopsy and testified the cause of death of the insured was acute dilation of the heart, chronic myocarditis and coronary sclerosis with occlusion, the latter being the immediate cause of death.

> "The appellant argues that in view of the facts disclosed by the autopsy, the insured could not have been in good health at the time the policies were delivered."
>
> "Continued good health is a relative term and manifestly relates to the representations made in the application, and medical examination, as to health. In the absence of fraud, misrepresentation or concealment, the condition of the applicant is fulfilled when delivery is made while the insured is in the same state of health as at the time of the application and medical examination. There is no claim in the case at bar that the insured's health changed between the date of the application and physical examination and the date of the delivery of the policies. We agree with the rule stated in Mutual Life Insurance Co. of New York v. Hoffman, 77 Ind. App. 209, 133 Northeastern, 405, 409, as follows:
>
> 'The provision that unless the first premium shall have been paid and the policy shall have been delivered to the applicant during his continuance in good health implies that the applicant

was in good health when the application was made. Whether the insurance company issued a policy depended upon the statements contained in the application and in the medical examination. The clause in question has no reference to any unsoundness of health at the time of or previous to the application and medical examination. It refers solely to a change in the condition of health after making the application and medical examination, and when it is not shown that the alleged unsoundness of health did not occur between the date of the application and medical examination and delivery of the policy, the insurance company must rely on the statements in the application and medical examination to void a recovery on the policy and not upon the claim in question.'

"The jury determined the issues in favor of appellee, and there is substantial evidence to support that conclusion so that a verdict of the jury is conclusive in this respect. Inter-Southern Life Insurance Company v. McElroy, 38 Fed. (2d), 557, 559."

In the case of *Lincoln National Life Insurance Company v. Mathisen,* 150 Fed. (2d) 292, the insurance company brought an action to cancel the life insurance policy issued on the life of Mathisen, March 15, 1943. He died May 12, 1943. Relief was denied the plaintiff and a judgment rendered for the amount of the policy to the defendant. It is claimed by the appellant that at the time of the delivery of the policy and payment of premium thereon, Mathisen was not in "good health". This fact was not dis-

closed to the appellant. The provision of the life insurance policy is as follows:

> "The insurance hereby applied for shall not be considered in force until the policy is issued by the company * * * and said policy manually received * * * during good health, and the first premium paid."

The Court also said:

> "Whatever doubts reside in the record by reason of sharp conflict over facts had to be resolved by the trial Court. Its findings are complete to cover contraverted issues of fact. Unless they are clearly erroneous, they must stand if they are supported by competent evidence of prohibitive value. See Rule 52(a) Rules of Civil Procedure, 28 U. S. C. A. following Section 723(c)."

> "It is clear from the record that the Court was of the view that on the issues of "good health" as of the delivery and acceptance date, the cases of Wills v. Policy Holders Life Insurance Company (1936), 12 Cal. App. (2d), 659, 666, and Burr v. Policy Holders Life Assurance Company (1933), 128 Cal. App., 563, 17 Pac. (2d), 1014, were decisive under California law and required the health issue to be resolved against appellant."

It is to be noted that the facts and the terms of the insurance in question in this case are almost identical with the case at bar, but the Appellate Court approved the decision rendered in the District Court upon the ground that there was some conflict of medical testimony and that the term "good health"

had application as of the delivery and acceptance date.

The record does not show that the deceased, Theodore W. Quandt, knew at the time of making application for insurance and medical examination anything about any ailment that he had.

The last two cases hereinbefore cited and both decided by this Court are on all fours with the case at bar and are decisive of this appeal. The facts involved in each of them are almost identical with the case at bar and the provisions in the insurance policy are also almost identical.

CONCLUSION.

It is our contention that as the insured did not know at the time of his application for insurance and the medical examination that he was afflicted with a cancer that this policy of insurance nevertheless took effect. It is to be noted that two physicians examining him found no symptoms or indication of any kind that he was afflicted with cancer at the time the application was made. It is reasonable to assume from this testimony that he was not at that time afflicted with a cancer.

There is no claim on this appeal of misrepresentations or concealment. As the policy of insurance was prepared by the insurance company, it must of necessity be construed strictly against the company.

Under the conditions we respectfully submit that the decision of the District Court should be approved.

Dated, San Francisco,
January 28, 1946.

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